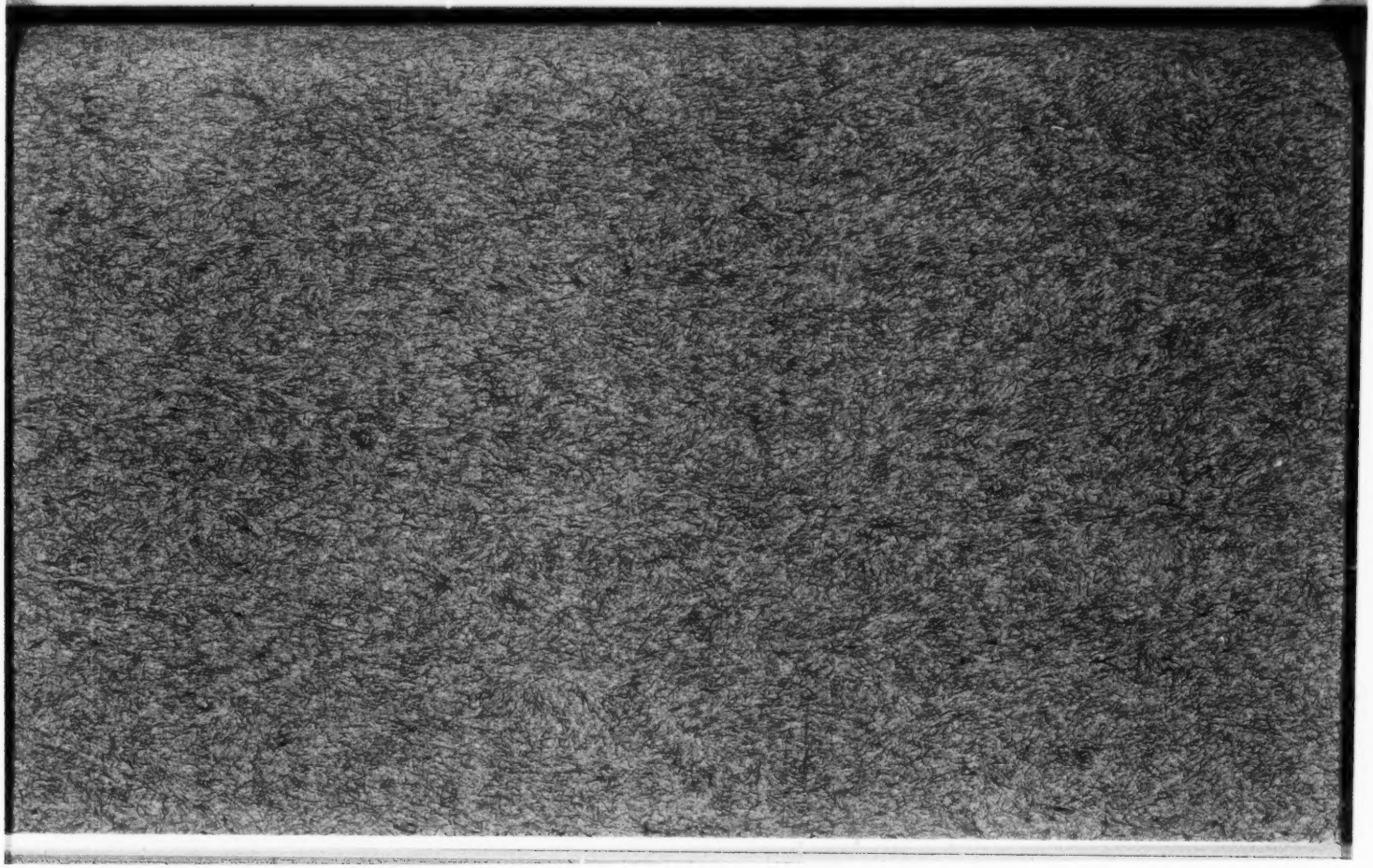

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 857

UNITED STATES GYPSUM COMPANY, PETITIONER

v.

NATIONAL WAR LABOR BOARD ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The District Court of the United States for the District of Columbia did not render an opinion. The opinion of the United States Circuit Court of Appeals for the District of Columbia (R. 98–99) is reported at 145 F. 2d 97.

JURISDICTION

The judgment of the Court of Appeals was entered on October 23, 1944 (R. 100). The petition for a writ of certiorari was filed on January 22, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The principal question presented is whether a "directive order" of the National War Labor Board, issued prior to the enactment of the War Labor Disputes Act and the promulgation of Executive Order No. 9370, may be enjoined or declared invalid and unenforceable in a proceeding brought in the Federal courts.

STATUTE AND REGULATIONS INVOLVED

The relevant portions of the statute and executive orders involved are set forth in the Appendix, pp. 14–18, *infra*.

STATEMENT

On September 23, 1943, the petitioner filed a complaint in the District Court of the United States for the District of Columbia seeking (1) to enjoin the respondents and "all other departments or agencies of the Government, whether named as defendants herein or not," from taking any action to enforce a directive order of the National War Labor Board issued on May 31, 1943, and (2) to obtain a declaratory judgment to the effect in substance that the order is void and that neither respondents nor the President has any power in relation to petitioner's non-compliance with the order (R. 34–39). The complaint named as defendants in their official capacities and individually the National War Labor Board, the Economic Stabilization Board, the chairmen and members of both Boards, and the Director of

Economic Stabilization (R. 2–3).[1] The President was not named as defendant and consequently is not a respondent herein.

The material allegations of the complaint may be summarized as follows: Petitioner operates a plant at Warren, Ohio, where it is principally engaged in the manufacture of metal stair treads, platforms, and other metal specialties for use in merchant and war ships, army tanks, and war plants (R. 7). In May 1942, at the expiration of a previous collective bargaining agreement, a dispute arose in the plant between petitioner and its employees concerning the terms and conditions of employment to be included in a new collective bargaining contract (R. 8). Upon failure of the parties to agree, the dispute was referred to the Conciliation Service of the United States Department of Labor, and thereafter, upon failure of conciliation attempts, it was certified by the Secretary of Labor to the National War Labor Board pursuant to the provisions of Executive Order 9017 (R. 9). A hearing was subsequently conducted before two mediation officers designated by the Board, and, upon the report and recommendations of these officers, the Board, on May 31, 1943, issued its directive order in the case which provided, *inter alia,* for a 5-cent per hour wage increase retroactive to July 20, 1942, and

[1] The Director of Economic Stabilization is also Chairman of the Economic Stabilization Board. The Board is advisory to the Director and possesses no independent powers.

the incorporation of maintenance of union membership and check-off clauses in a new contract (R. 9–15).

The complaint further alleges in substance that petitioner informed the Board that it rejected certain provisions of the directive order; that at a subsequent hearing before the Board on June 24, 1943, a member of the Board threatened to refer the matter to the President for action; that the matter has been referred to the President; that petitioner's noncompliance has been certified to the respondent Director of Economic Stabilization; and that the Director, pursuant to the provisions of Executive Order 9370, promulgated August 16, 1943, "is required," and that he, together with other departments of Government, "are about to or have taken action," to apply certain sanctions specified in Executive Order 9370 for the purpose of compelling petitioner to accede to the provisions of the directive order (R. 16–34). The complaint alleges further that enforcement of the directive order would violate petitioner's constitutional rights, that the order was adopted without due process of law, and that certain of its provisions are in conflict with the National Labor Relations Act and the provisions of the War Labor Disputes Act which was adopted subsequent to the issuance of the order (R. 15–34).

The respondents moved to dismiss the complaint or, in the alternative, for summary judg-

ment on the grounds that the court had no jurisdiction over the subject matter of the action and that the complaint failed to state a claim upon which relief could be granted (R. 46–48). In support of the motion, the respondents filed an affidavit (R. 46–48) by Lloyd K. Garrison (then General Counsel and Executive Director of the National War Labor Board) stating that the Director of Economic Stabilization had neither threatened nor taken action to compel compliance with the directive order; that the Director in a letter to the Board (R. 48) had disclaimed any authority to invoke sanctions under Executive Order 9370 because in his opinion his discretion and power to do so applied only to Board orders issued pursuant to the War Labor Disputes Act of June 25, 1943, c. 144, 57 Stat., 163, enacted approximately one month after issuance of the directive order here involved.

In opposition to the motion for summary judgment, the petitioner filed affidavits and a partial transcript of a hearing before a committee of Congress (R. 49–93). The transcript revealed that in an early and unrelated case the Board had attempted to secure compliance with a directive order through other agencies of the Government. The affidavits recited that in another unrelated case the Board had referred the matter of an employer's noncompliance with such an order to the President who had thereafter ordered the Army to seize the employer's plant, and that in a

third unrelated case of noncompliance, the employer's "officials were notified [the affidavit does not state by whom] that the military forces of the Government had received instructions to stand by awaiting further instructions with reference to the non-compliance."

The District Court denied the respondents' motion to dismiss or for summary judgment (R. 95). On special appeal allowed by the Court of Appeals (R. 95), the order of the District Court was reversed (R. 98–99) on the authority of *Employers Group of Motor Freight Carriers* v. *National War Labor Board,* 143 F. (2d) 145 (App. D. C.), certiorari denied October 9, 1944 (No. 350, this Term), and *National War Labor Board* v. *Montgomery Ward & Co.,* 144 F. (2d) 528 (App. D. C.), certiorari denied November 13, 1944 (No. 538, this Term), and the cause was remanded to the District Court for further proceedings not inconsistent with the court's opinion (R. 100).

ARGUMENT

Petitioner contends, notwithstanding the decisions in the *Employers Group* and *Montgomery Ward* cases, that it is entitled to injunctive relief against respondent or, in any event, to a declaratory judgment fixing the respective rights of the parties, and that the decision of the court below denying its right to either form of relief constitutes reversible error. In the *Employers Group* and *Montgomery Ward* cases it was held,

as is plain, that there is no statutory provision for judicial review of War Labor Board directive orders, and that the complaints in those cases failed to allege grounds entitling the plaintiffs either to injunctive relief or, in the *Montgomery Ward* case, to a declaratory judgment. We submit that there is nothing in the present case which justifies a departure from the sound rule there announced.

1. *Petitioner is not entitled to equitable relief.*

Since no power vested in the Board at the time of the issuance of its directive order herein [2] and no power has since been conferred upon it to compel compliance with its orders by legal proceedings or by the imposition of sanctions, the order in no way altered the legal rights of the parties. Despite this apparent lack of the requisite ground for judicial review of the Board's order (*United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299; *Pennsylvania R. R. Co.* v. *Labor Board*, 261 U. S. 72; *Pennsylvania Federation* v. *Pennsylvania R. R. Co.*, 267 U. S. 203; *Switchmen's Union* v. *Mediation Board*, 320 U. S. 297; *Baltimore Transit Co.* v. *Flynn*, 50 F. Supp.

[2] As before stated, the directive order in question, like that involved in the *Employers Group* case, was issued prior to the passage of the War Labor Disputes Act. It may be noted that this fact substantially diminishes the practical importance of the question presented, since Board orders after the passage of the Act on June 25, 1943, have been issued pursuant thereto.

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382 (D. Md.); the *Employers Group* and *Montgomery Ward* cases, *supra*), the petitioner contends that respondents threaten to or are required to take steps to compel compliance with the directive order, and that an examination of the validity of the order is warranted under the general equity powers of the court. With respect to none of the respondents, however, is there adequate ground for such a contention.

(a) *With respect to the Director of Economic Stabilization.*

Petitioner alleges that this official "is required to" take action against it to compel compliance by directing the withdrawal of priorities, etc., under Executive Order 9370 (promulgated two and one-half months after the issuance of the Board's directive order) and alleges further, apparently on the basis of this legal conclusion as to the Director's duties, that the Director "will, and is about to" and that he and others "are about to or have taken" action against it (R. 32–33). Both the premise and the conclusion are erroneous. As is manifest from the terms of the Order and was stated by the court below in the *Montgomery Ward* case with respect to an identical contention regarding the mandatory nature of the Director's functions, "Executive Order 9370 neither requires nor authorizes the Director to issue any directives except such as he may deem necessary" (144 F. 2d at 531). The Director has expressly disclaimed that his discretionary

powers under the Executive Order extend to the enforcement of the present order, for the reason that it was issued prior to the enactment of the War Labor Disputes Act (R. 48). Consequently, as is affirmed in the Garrison affidavit (R. 46–47), the Director has neither taken nor threatened to take action to compel petitioner's compliance with the directive order.[3]

---

[3] The disclaimer of the Director (R. 48) is itself sufficient to prevent issuance of the injunction sought. Petitioner's allegation that the Director "will," is "about to," or "has taken" action could at very most be viewed as an allegation of threatened injury. To render a public official suable in his personal capacity (the Director's immunity from suit as agent of the Government in his official capacity in the absence of statutory consent, here lacking, is well established: *Louisiana* v. *McAdoo*, 234 U. S. 627, 632; *Oregon* v. *Hitchcock*, 202 U. S. 60, 69; *Wells* v. *Roper*, 246 U. S. 335, 337), he must either be acting or threatening to act outside the scope of his authority or under an invalid law or order. *Ex parte Young*, 209 U. S. 123, 159. And to maintain injunctive proceedings on the ground of threatened action, there must be a present intent or readiness affirmatively expressed to proceed under the allegedly invalid statute or order. *Watson* v. *Buck*, 313 U. S. 387, 400; *Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45, 49; *Gibbs* v. *Buck*, 307 U. S. 66, 77–78; *Ex parte La Prade*, 289 U. S. 444, 458. Consequently, petitioner's contention (Pet. 35–36; Br. 23, 41) that the Garrison affidavit is insufficient because "conclusory" is footless.

The Director's press release of February 15, 1945, defining the occasions upon which sanctions authorized by Executive Order No. 9370 may be employed to enforce orders of the National War Labor Board, was issued in connection with the use of such sanctions to secure compliance with a directive order dated November 9, 1944, in *E. A. Laboratories, Inc.*, Case No. 111–11443–D. The War Labor Disputes Act was enacted June 25, 1943.

(b) *With respect to the War Labor Board.*

The Board has not claimed any power of enforcement with respect to its directive order. It affirmatively appears that at the hearing held June 24, 1943, to which petitioner adverts, petitioner was informed that the Board lacked enforcement powers of its own (R. 20). Petitioner was there informed that if it remained in noncompliance "the Board will refer this matter to the President for such action as he deems appropriate" (R. 23). The complaint alleges that this step has been taken, and the short answer to petitioner's prayer for injunctive relief against the Board is that there is nothing further the Board can do or is threatening to do.

Plainly, upon these facts, petitioner is in no better position than were the plaintiffs in the *Employers Group* and *Montgomery Ward* cases, in which this Court denied review of the decision of the Court of Appeals granting motions identical with that made by respondents. As stated in the latter decision (144 F. 2d at 530):

> A plaintiff cannot confer jurisdiction to review even commonplace administrative action by a mere forecast that he will be irreparably injured if the court does not intervene. He must allege facts which support his forecast. The plaintiff has not done so.

As noted in the decision of the court below, this case differs from *Employers Group, etc.* v. *Board*

chiefly in that the complaint here alleges that the Board has reported the fact of noncompliance to the Director of Economic Stabilization, who disclaims any power to act in respect thereto, *supra*, p. 9, and to the President, whereas the earlier complaint in effect alleged that the Board might make such reports. The alleged report to the President is "informatory and at most, advisory" and not subject to judicial review. *Employers Group, etc.* v. *Board*, 143 F. 2d 145, 151; *United States* v. *Bush & Co.*, 310 U. S. 371, 379; *Standard Computing Scale Co., Ltd.* v. *Farrell*, 249 U. S. 571, 574; *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810, 814 (C. C. A. 2); *Baltimore Transit Co.* v. *Flynn*, 50 F. Supp. 382 (D. Md.). And whether the President, who is not a party here, would take further action is entirely conjectural and would depend upon an independent determination to be made by him.[4] The alleged fact that the Board has reported the matter to the President does not establish any independent ground for judicial review. As succinctly stated by the court below (R. 99):

> The *Employers Group* case decided that the Board's order was not enforceable and

[4] If the President should order possession to be taken by the United States of the petitioner's plant, such action would be taken to prevent a break-down of operations deemed essential in the interests of the war effort. The petitioner's fear of a possible exercise by the President of his seizure powers would thus not be removed even if the order were enjoined or declared invalid.

> therefore not reviewable; that any reports which the Board might make would be merely advisory; and that the correctness of administrative advice cannot be reviewed by the courts. Such advice is no more subject to review after it has been given than before.

The Board's order "does not of itself adversely affect complainant" (cf. *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 130), contains none of the incidents requisite for judicial review (see cases *supra,* p. 8), and affords no basis for injunctive relief.

2. *Petitioner is not entitled to a declaratory judgment.*

As in the *Montgomery Ward* case, petitioner seeks to obtain a declaratory judgment as to the validity of the Board's order. We have already shown that petitioner is not entitled to equitable relief. By the same token the petitioner is not entitled to declaratory relief. There is here presented no "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment" (*Maryland Casualty Co.* v. *Pacific Co.,* 312 U. S. 270, 273). *Helco Products Co.* v. *McNutt,* 137 F. 2d) 681 (App. D. C.); *Electric Bond & Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419, 443; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 324–325; *Smith* v. *American Asiatic Underwriters, Federal,* 127 F.

2d 754, 756–757 (C. C. A. 9). The Declaratory Judgment Act does not open the federal courts to those who seek "to obtain an advisory decree" upon "hypothetical controversies which may never become real." *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 443. *Coffman* v. *Breeze Corporations, Inc.*, No. 71, this Term, decided January 2, 1945.

CONCLUSION

The practical significance of the question presented is sharply diminished by reason of the enactment of the War Labor Disputes Act within the month following issuance of the Board's directive order, and the case falls within the principle of the *Employers Group* and *Montgomery Ward* cases, in which this Court denied further review. The decision below is correct and no conflict of authority is presented. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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FEBRUARY 1945.

APPENDIX

I

Statute Involved

The War Labor Disputes Act (57 Stat. 163, 50 U. S. C. App. (Supp. III) 1501) provides, in part, as follows:

> Sec. 7. (a) The National War Labor Board (hereinafter in this section called the "Board"), established by Executive Order Numbered 9017, dated January 12, 1942, in addition to all powers conferred on it by section 1 (a) of the Emergency Price Control Act of 1942, and by any Executive order or regulation issued under the provisions of the Act of October 2, 1942, entitled "An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes", and by any other statute, shall have the following powers and duties:
>
> (1) Whenever the United States Conciliation Service (hereinafter called the "Conciliation Service") certifies that a labor dispute exists which may lead to substantial interference with the war effort, and cannot be settled by collective bargaining or conciliation, to summon both parties to such dispute before it and conduct a public hearing on the merits of the dispute. If in the opinion of the Board a labor dispute has become so serious that it may lead to substantial interference with the war

effort, the Board may take such action on its own motion. At such hearing both parties shall be given full notice and opportunity to be heard, but the failure of either party to appear shall not deprive the Board of jurisdiction to proceed to a hearing and order.

(2) To decide the dispute, and provide by order the wages and hours and all other terms and conditions (customarily included in collective-bargaining agreements) governing the relations between the parties, which shall be in effect until further order of the Board. In making any such decision the Board shall conform to the provisions of the Fair Labor Standards Act of 1938, as amended; the National Labor Relations Act; the Emergency Price Control Act of 1942, as amended; and the Act of October 2, 1942, as amended, and all other applicable provisions of law; and where no other law is applicable the order of the Board shall provide for terms and conditions to govern relations between the parties which shall be fair and equitable to employer and employee under all the circumstances of the case.

* * * * *

II

Regulations Involved

1. Executive Order No. 9017 (January 12, 1942; 7 F. R. 237) reads, in part, as follows:

> Whereas by reason of the state of war declared to exist by joint resolutions of the Congress, approved December 8, 1941 and December 11, 1941, respectively (Public Laws Nos. 328, 331, 332, 77th Congress), the

national interest demands that there shall be no interruption of any work which contributes to the effective prosecution of the war; and

WHEREAS as a result of a conference of representatives of labor and industry which met at the call of the President on December 17, 1941, it has been agreed that for the duration of the war there shall be no strikes or lockouts, and that all labor disputes shall be settled by peaceful means, and that a National War Labor Board be established for the peaceful adjustment of such disputes;

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and the statutes of the United States, it is hereby ordered:

1. There is hereby created in the Office for Emergency Management a National War Labor Board, hereinafter referred to as the Board. The Board shall be composed of twelve special commissioners to be appointed by the President. Four of the members shall be representative of the public; four shall be representative of employees; and four shall be representative of employers. The President shall designate the Chairman and Vice-Chairman of the Board from the members representing the public. The President shall appoint four alternate members representative of employees and four representative of employers, to serve as Board members in the absence of regular members representative of their respective groups. Six members or alternate members of the Board, including not less than two members from each of the groups represented on the Board, shall constitute a quorum. A vacancy in the

Board shall not impair the right of the remaining members to exercise all the powers of the Board.

* * * * *

3. The procedures for adjusting and settling labor disputes which might interrupt work which contributes to the effective prosecution of the war shall be as follows: (a) The parties shall first resort to direct negotiations or to the procedures provided in a collective bargaining agreement. (b) If not settled in this manner, the Commissioners of Conciliation of the Department of Labor shall be notified if they have not already intervened in the dispute. (c) If not promptly settled by conciliation, the Secretary of Labor shall certify the dispute to the Board, provided, however, that the Board in its discretion after consultation with the Secretary may take jurisdiction of the dispute on its own motion. After it takes jurisdiction, the Board shall finally determine the dispute, and for this purpose may use mediation, voluntary arbitration, or arbitration under rules established by the Board.

2. Executive Order No. 9370 (August 16, 1943; 8 F. R. 11463) reads, in part, as follows:

AUTHORIZING THE ECONOMIC STABILIZATION DIRECTOR TO TAKE CERTAIN ACTION IN CONNECTION WITH THE ENFORCEMENT OF DIRECTIVES OF THE NATIONAL WAR LABOR BOARD

By virtue of the authority vested in me by the Constitution and the statutes of the United States, it is hereby ordered:

In order to effectuate compliance with directive orders of the National War

Labor Board in cases in which the Board reports to the Director of Economic Stabilization that its orders have not been complied with, the Director is authorized and directed, in furtherance of the effective prosecution of the war, to issue such directives as he may deem necessary:

(a) To other departments or agencies of the Government directing the taking of appropriate action relating to withholding or withdrawing from a non-complying employer any priorities, benefits or privileges extended, or contracts entered into, by executive action of the Government, until the National War Labor Board has reported that compliance has been effectuated;

* * * * *

(c) To the War Manpower Commission, in the case of non-complying individuals, directing the entry of appropriate orders relating to the modification or cancellation of draft deferments or employment privileges, or both.

U. S. GOVERNMENT PRINTING OFFICE: 1943